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IN THE

Supreme Court of the United States

October Term, 1959
No. 155

LOUIS KIRSHBAUM,
Appellant,

vs.

THE CITY OF LOS ANGELES, a municipal corporation, and THE COUNCIL OF THE CITY OF LOS ANGELES,
Appellees.

On Appeal From the Supreme Court of the State of California.

MOTION OF APPELLEES TO DISMISS.

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SUBJECT INDEX

PAGE

Statement of the case 2

Basis of California Supreme Court decision 2

I.

Issuance of the writ 2

II.

The ordinance involved 4

III.

Validity of contract 9

Argument 16

I.

The appeal does not present a substantial federal question 16

1. The determination by the California Supreme Court that a writ of prohibition should issue from that court to stay any further proceedings in the Los Angeles Superior Court to enjoin declaring the results of a referendary election on a city ordinance does not present any reviewable question before the United States Supreme Court 16

   (a) The California Supreme Court's determination of the absence of any disputed material question of fact was made after careful investigation and its determination is conclusive 17

2. The determination that public funds may lawfully be expended by the City of Los Angeles involves only the construction of a city ordinance and the power and authority of the City of Los Angeles under the Constitution and laws of the State of California 19

PAGE

3. Whether the City of Los Angeles may sell to a private corporation land acquired from the Housing Authority of the City of Los Angeles (a state agency) by deed containing language relative to use for public purposes only and use its best efforts to have this deed restriction removed involve matters relating to construction of the deed and power and authority of the City under state law which are not the subject of review by the United States Supreme Court nor is any contract right of any member of the public involved 20

4. Determination of the legality of the proposed expenditure of $2,000,000 in site preparation of the land to be conveyed by the City depends exclusively upon interpretation of the ordinance and the power of the City to contract under state law 23

5. The tax structure of a state designating the property to be taxed and exemptions from taxation is purely a state affair of which the United States Supreme Court will refrain from passing upon 24

II.

The federal questions sought to be reviewed were not timely or properly raised, or expressly passed on by the California Supreme Court 25

III.

The judgment rests on an adequate nonfederal basis 27

Conclusion 28

TABLE OF AUTHORITIES CITED

CASES	PAGE
Bowe v. Scott, 233 U. S. 658	25
City of Los Angeles v. Superior Court, 51 A. C. 425, 333 P. 2d 745	2
Cook County v. Calumet & Chicago Canal Co., 138 U. S. 635	27
Fischer v. City of St. Louis, 194 U. S. 361	20, 21, 23
Gasquet v. Lapeyre, 242 U. S. 367	16
Green v. Frazier, 253 U. S. 233	19
Gundling v. City of Chicago, 177 U. S. 183	20
Henderson Bridge Co. v. City of Henderson, 173 U. S. 592	20
Housing Authority v. City of Los Angeles, 38 Cal. 2d 853	21
John v. Paullin, 231 U. S. 583	17
Jones v. City of Portland, 245 U. S. 217	19
Kovacs v. Cooper, 336 U. S. 77	24
Lynch v. New York ex rel. Pierson, 293 U. S. 52	27
Missouri, ex rel. Hill v. Dockery, 191 U. S. 165	24
Newport Light Co. v. City of Newport, 151 U. S. 527	18
Perryman v. Woodward, 238 U. S. 148	18
Ruben v. City of Los Angeles, 51 A. C. 861, 337 P. 2d 825	14, 17
Seattle R. & S. Co. v. Washington ex rel. Linhoff, 231 U. S. 568	19, 21, 23
United States v. Pink, 315 U. S. 203	18
Van Ness v. Mayor, etc. of City of Washington, 29 U. S. 232	22
Walsh v. Columbus, Hocking Valley & Athens R. Co., 176 U. S. 469	21
Zadig v. Baldwin, 166 U. S. 485	26

RULES

PAGE

California Rules on Appeal, Rule 16, Subsec. 1, par. (b)..... 1
California Rules on Original Proceedings in Reviewing Courts, Rule 56(b) 25
California Rules on Original Proceedings in Reviewing Courts, Rule 56(c) 25

STATUTES

California Code of Civil Procedure, Sec. 1089..... 25
California Code of Civil Procedure, Sec. 1104..... 25
California Code of Civil Procedure, Sec. 1105..... 25
California Constitution, Art. I, Sec. 13..... 25
Los Angeles City Ordinance No. 110,204 .....2, 4, 28
United States Constitution, Art. I, Sec. 10.....21, 26
United States Constitution, Fourteenth Amendment.....20, 25

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THE CITY OF LOS ANGELES, a municipal corporation, and THE COUNCIL OF THE CITY OF LOS ANGELES,

Appellees.

On Appeal From the Supreme Court of the State of California.

MOTION OF APPELLEES TO DISMISS.

The City of Los Angeles, a municipal corporation, and The Council of The City of Los Angeles, petitioners below and appellees herein, respectfully move that the appeal of Louis Kirshbaum in this cause be dismissed under Rule 16, subsection 1, paragraph (b) upon each of the following grounds:

1. The appeal does not present a substantial federal question;
2. The federal questions sought to be reviewed were not timely or properly raised, or expressly passed on by the California Supreme Court;
3. The judgment rests on an adequate nonfederal basis.

Statement of the Case.

The case below is an original proceeding in the Supreme Court of the State of California for the issuance of a Writ of Prohibition to prevent the Superior Court in and for the County of Los Angeles from proceeding further in a case pending in the latter court for declaratory relief to determine the validity of a referendum election held on June 3, 1958, on Ordinance No. 11,204 of The City of Los Angeles and to enjoin the certification of the results thereof. A preliminary injunction was ordered issued by the Superior Court. (Pet. for Writ, pp. 9-11) The California Supreme Court issued an alternative Writ of Prohibition; and, by its judgment, from which appeals are taken by two "real parties in interest," the issuance of a Peremptory Writ of Prohibition was ordered as prayed for. *The City of Los Angeles v. Superior Court*, 51 A. C. 425, 440; 333 P. 2d 745, 753.

Basis of California Supreme Court Decision.

I.

Issuance of the Writ.

In ordering the issuance of the Peremptory Writ of Prohibition the California Supreme Court held:

1. "The writ of prohibition is an appropriate remedy to arrest the proceedings of a court when there is not a plain, speedy, and adequate remedy in the ordinary course of the law and when the proceedings of the court are without or in excess of its jurisdiction. (Code of Civ. Proc., Secs. 1102, 1103.)"

2. "To permit the issuance of prohibition it is not necessary that there be a lack of jurisdiction over

the subject matter or parties in the fundamental sense but only that there be a want or excess of the power of the court as defined by statute or by rules developed and followed under the doctrine of *stare decisis* (*Tide Water Assoc. Oil Co. v. Superior Court,* 43 Cal. 2d 815, 821 [279 P. 2d 35]; *Abelleira v. District Court of Appeal,* 17 Cal. 2d 280, 287 *et seq.* [109 P. 2d 942, 132 A. L. R. 715].)"

3. "Subdivision 7 of section 3423 of the Civil Code and the second subdivision 7 of section 526 of the Code of Civil Procedure provide that an injunction cannot be granted to 'prevent a legislative act by a municipal corporation'. Subdivision 4 of section 3423 of the Civil Code and the second subdivision 4 of section 526 of the Code of Civil Procedure similarly provide that an injunction cannot be granted to 'prevent the execution of a public statute by officers of the law for the public benefit.'"

4. "A court acts in excess of its jurisdiction if it attempts to enjoin the enactment or enforcement of a valid public statute or ordinance." (Citing numerous California citations exclusively.)

5. "Although prohibition should not issue where the propriety of the trial court's action depends upon questions of fact * * * (citing two California decisions) * * * none of the persons attacking the contract has pointed to any evidence which would present a substantial question of fact upon a material issue."

6. "It follows that prohibition will lie to test the validity of the ordinance," and the decision holds the ordinance to be valid.

II.

The Ordinance Involved.

It is alleged in the Petition for Writ of Prohibition, (Par. X, p. 11) and not denied, that the Superior Court's actions were "based solely upon an attack upon the validity of Ordinance No. 110,204 from the standpoint of the authority of The City of Los Angeles to enter into and perform the contract as set forth and authorized in said ordinance."

Under the contract authorized by Ordinance No. 110,204 *City will*

1. Convey 185 acres, more or less, of land presently owned by it in Chavez Ravine and use its best efforts to acquire, at a reasonable cost, and convey additional land to make a total of 300 acres, more or less, reserving (a) all mineral rights which it now owns or may hereafter acquire, and (b) a drill site not to exceed 5 acres, the location thereof to be mutually agreed upon by the City and the Ball Club, which will not interfere with the Ball Club's operations. (1.)*

2. Retain title, for 20 years, to 40 acres of the 300 acre parcel to assure performance by the Ball Club of its policy of providing and maintaining recreational facilities and convey same to the Ball Club or its nominee at the end of such period, in the event such policy and terms of this agreement pertaining to recreational facilities on the 40 acres have been faithfully performed. (1(c).)

3. Make conveyance free and clear of any deed restriction on use, and use its best efforts to have elimi-

*Numbers in parenthesis refer to paragraphs of the contract set forth in the ordinance.

nated or modified to permit the use contemplated by the Ball Club, the provision in the deed from the Housing Authority reading:

> "To be used for public purposes only; and not to be used directly or indirectly by the City of Los Angeles, or its grantees, successors in interest, assigns, or any other person or persons whatsoever claiming by, through or under the City of Los Angeles, for a period of 20 years from and after the date hereof, for residential development or residential subdivision." (1(d).)

4. Upon conveyance, commence street vacation proceedings, upon demand of the Ball Club, as to existing public streets which will no longer be needed for present or future street purposes and deliver any title which may remain in City, without any further consideration. (2.)

5. Prior to conveyance of any property, expend $2,000,000 to place such property in a proper condition to convey to Ball Club, or its nominee, the manner in which such money will be spent for such purpose to be designated by Ball Club. (3.)

6. Provide such public streets as may be needed within the periphery of the area to be acquired, the cost thereof other than the cost of acquiring necessary land, to be a part of th. $2,000,000 mentioned above. (4.)

7. Initiate proceedings for the purpose of rezoning the property to be conveyed to the Ball Club to "C-3" and for granting of "a conditional use permitting its use for a baseball stadium as herein provided." (7 Par. 2.)

8. Make demand upon the County of Los Angeles to furnish the funds heretofore or hereafter voted and or appropriated for the construction of necessary access

roads, including acquisition of rights of way therefor, and will proceed diligently with the construction of such access roads in the event the County makes funds therefor available to the City. (Last Par.)

9. Place one-half of all monies, payments, royalties or other consideration received by the City from mineral rights reserved in property to be conveyed by City and mineral rights in Wrigley Field conveyed by the Ball Club to the City, in a special trust fund to be expended solely for the purpose of providing and maintaining recreational facilities to promote the youth program of the Ball Club, the location and type of such recreational facilities to be mutually agreed upon by the City and the Ball Club, with the approval of the City Council by ordinance. (1(b) and 5.)*

BALL CLUB *will*

1. Convey to the City the land and improvements known as Wrigley Field, including all mineral rights. (5.)

2. Construct on the property conveyed by the City "at Ball Club's cost and expense, a modern baseball stadium, seating not less than 50,000 people." (6.)

3. Move to Los Angeles "the present Brooklyn National League Baseball franchise and ball team known as the 'Dodgers'." (7.)

4. Construct recreational facilities costing not to exceed a half million dollars on the 40-acre portion of the

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*As pointed out in the California Supreme Court decision:

"The ball club has given formal notice to the city that the club has waived and relinquished all rights conferred upon it under these provisions and has assigned to the city all such rights. The provisions being solely for the benefit of the club, it could properly waive them, and there is no longer any reason to treat them as parts of the contract." (51 A. C. 425, 434, 333 P. 2d 745, 749.)

property to be conveyed by the City, such recreational facilities to be mutually agreed upon by the City and Ball Club prior to conveyance of the property, and constructed simultaneously with the stadium. (7th Whereas Par.)

5. Maintain the recreational facilities on the 40-acre parcel for 20 years at an annual cost of $60,000, but not furnish personnel, and in the event the cost of maintenance does not amount to $60,000 in any year, pay the balance to the City "so that it may be used by City for the providing of or maintaining recreational facilities elsewhere in said City." (7th Whereas Par.)

The foregoing obligations are subject to the following:

1. The recreational facilities on the 40-acre parcel are to be under the control of the City; however, the City shall not permit the scheduling of any event at any of the recreational facilities which would involve the concentration of a large number of participants or spectators at times when the Ball Club has scheduled an event at the baseball stadium, at which time the Ball Club will have the right to use any facilities suitable for parking as may be provided on the 40-acre parcel. (7th Whereas Par.)

2. Any violation of the terms of the agreement with reference to the recreational facilities shall not invalidate or affect any transfers of land which theretofore have been made pursuant to the agreement. (1(c).)

3. In the event the City is unable to have the deed from the Housing Authority modified to eliminate the provision for public use only, the contract shall be of no further force or effect. (1(d).)

4. The agreement is made in reliance upon the action of the Board of Supervisors of Los Angeles County in

adopting the resolution attached as Exhibit B thereto, providing for furnishing funds up to $2,740,000 to construct necessary access roads. (Next to last Par.)

The declarations contained in the ordinance and the contract are to the effect that:

1. The Contract would be highly beneficial to the City and the inhabitants and taxpayers thereof, and to the public, and is useful and convenient in connection with the exercise of the City's rights and powers. (Introductory Ordinance Recital.)

2. The City is the owner of certain property in Chavez Ravine and is in the process of acquiring additional property in the area and this property is no longer required for the use of the City and its return to the tax rolls would produce substantial additional property tax revenues to the City. (1st, 2nd and 3rd Whereas Par.)

3. The Ball Club is willing to acquire such property and build at its own expense a major league baseball stadium for the Brooklyn Dodgers and the bringing of major league baseball to Los Angeles would result in direct and indirect benefits to the City and would result in a large additional payroll in this area and it would be highly beneficial to the City, the public and its inhabitants to have such property the site of a major league baseball stadium, and the City would receive substantial tax revenues from sources other than the Ball Club, incident to major league baseball in Los Angeles. (3rd, 5th, 6th and 7th Whereas Par.)

4. The Ball Club is able and willing to have the baseball stadium and grounds known as Wrigley Field conveyed to the City for the property now owned and to be acquired by the City in Chavez Ravine, and Wrigley

Field would be a suitable place for holding various events including, but not limited to, amateur baseball games and similar activities, for which the City is in need, and would be of great value to the City and its inhabitants. (10th to 13th Whereas Par.)

5. The Ball Club has a long-standing policy of admitting juveniles to various games free of charge as a method of combatting juvenile delinquency and stimulating interest in healthful recreational activities, and as part of this policy will construct on the 40-acre parcel the recreational facilities, costing not to exceed a half million dollars, to be mutually agreed upon, which additional recreational facilities are sorely needed by the City and will fill a definite public need and be of great value to the City. (7th to 10th Whereas Par.)

III.

Validity of Contract.

The California Supreme Court held the contract authorized by the ordinance to be valid for the following reasons:

1. "The benefits to be received by the City are apparent, and the adequacy of the consideration, which involves the comparative values of the premises of the parties, is a matter which, in the absence of abuse of discretion, rests in the judgment and discretion of the City Council." (Citing California authorities exclusively.)
2. "There is no merit to the argument that the contract lacks mutuality in that there is no absolute obligation requiring the ball club to purchase the 40-acres to be used for recreational purposes or binding it to pay any amount therefor. * * * The

consideration for this conveyance obviously is to be found in the various obligations which must be performed by the ball club whether or not it accepts the 40 acres."

3. "The contract likewise is not defective because it provides that a violation of the agreement by the ball club regarding its obligations concerning the recreational facilities will not affect any transfer of lands theretofore made. The City is amply protected, in the event of such a default, by the fact that it may continue to retain title to the 40 acres and, in addition, may maintain an action for damages for breach of contract."

4. "The contract is claimed to be void because it contains promises to agree in the future. * * * The reservation of an oil drilling site and the establishment and maintenance of the recreational facilities on the 40-acre parcel are, of course, important features of the contract; but, in our opinion, the uncertainty with respect to the exact location and size of the drilling site and the details with respect to the recreational facilities are matters which should not be treated as rendering the contract void. There is no indication that the city and the ball club are unable to come to an agreement as to them, and, if the parties cannot do so, the court may determine the matters within the test of reasonableness referred to above, in accordance with the general purposes of the contract. Similarly, the court could fix a reasonable rental for Wrigley Field, if this should ever become necessary."

5. "In considering whether the contract made by the city has a proper public purpose, we must view the contract as a whole, and the fact that some of the provisions may be of benefit only to the baseball club is immaterial, provided the city receives benefits which serve legitimate public purposes. * * * (Citing two California cases.) The transfer of Wrigley Field from the ball club to the city and the construction by the club on the 40-acre parcel of recreational facilities to be used by the city for 20 years, together with maintenance of the facilities for that period, are obviously for proper public purposes. In view of these direct benefits, it is unnecessary for us to consider whether the city could properly expend public funds for the various indirect benefits which the public will receive under the contract, such as the bringing to the city of a major league baseball club, the construction by the club of its new stadium, and the return of the Chavez Ravine property to the tax rolls."

6. "When the contract is viewed as a whole, there is no inconsistency, as argued, between the declaration, on the one hand, that the 185 acres of Chavez Ravine property now owned by the city are no longer required for the use of the city and the recital, on the other hand, that 40 acres of the total of 300 to be conveyed to the club are to be used by the city for needed recreational facilities. * * * It is difficult to see anything improper in an agreement by which a city, owning more land than it needs, conveys some of that land in exchange for the construction and maintenance of needed facilities for use by the city over a 20-year period."

7. "In our opinion the city can properly agree that, in return for legitimate benefits which it will receive under the contract, it will use its best efforts to acquire additional land to convey as part of the consideration to be furnished by it, even though the city is in effect agreeing to purchase land for the purpose of selling it immediately thereafter to a private corporation. * * * While a city may not purchase land when no public use or purpose is involved, in the present case the additional land is to be acquired for a proper public purpose, namely, that of furnishing the type of contract consideration which enables the city to enter into a bargain which it deems advantageous. * * * This case does not present the situation of a municipal government which seeks to purchase property for the purpose of making a gift of it to a private enterprise or of otherwise improperly using city funds to aid private persons, because the property which the city is to endeavor to buy, if acquired, will not be given away to anyone but will be used as part of the consideration of a contract entered into for a legitimate public purpose."

8. "It is contended that the city does not have power to sell to a private corporation land held by the city subject to a public purpose restriction imposed by the grantor's deed to the city and that the city has no power to enter into an agreement with a private corporation obligating the city to extinguish such a restriction. This contention relates to land acquired from the Housing Authority of the City of Los Angeles by a deed containing a restriction reading, in part, 'to be used for public purposes

only; and not to be used directly or indirectly by the City of Los Angeles, or its grantees, successors in interest, assigns, or any other person or persons whatsoever claiming by, through or under the City of Los Angeles, for a period of 20 years from and after the date hereof, for residential development or residential subdivision.' * * *

"The grantor did not intend by this provision to prohibit the city from selling the property; the provision contains no such limitation and plainly contemplates the possibility of a sale n that the restriction is made applicable to use of the property by the 'grantees' and 'assigns' of the city. * * * In view of the declaration by the council that the city no longer requires the use of the property, the city's promise to use its best efforts to have the deed restriction removed cannot be said to constitute an illegal agreement to bind the city council to exercise its judgment in the future. Any possibility that the Housing Authority may have a right to complain of a termination of the public use upon a sale by the city will disappear if the city is able to obtain the Housing Authority's consent to eliminate the restriction. Similarly; such a consent will obviate any difficulty with respect to the restriction against residential use of the property. Whether or not the Housing Authority has power to execute, and is willing to execute, a release of its rights under the deed restriction is a question which relates to the performance rather

than to the validity of the contract and is not before us in this proceeding."*

9. "We find no merit to the claim that the city has attempted to make an illegal delegation to a private corporation of the duties of the city council by agreeing that, prior to passage of title, the city shall spend $2,000,000 to place the Chavez Ravine property 'in a proper condition to convey to' the ball club, the manner in which the money will be spent for such purposes to be designated by the ball club. It seems obvious that the city could not be required by the ball club, under this provision, to make any expenditures not in accord with the general purposes of the contract. The city could have paid the money to the club outright, as part of the contract consideration, without retaining any control over the manner or purpose for which the money should be spent, and the arrangement by which the city will keep possession of the money until it is spent, is an advantage to the city which does not militate against the validity of the contract."

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*The California Supreme Court later held in *Ruben v. City of Los Angeles*, 51 A. C. 861, 866 [337 P. 2d 825, 828]:

"In our prior decision we expressly withheld consideration of the question whether or not the Housing Authority has power, *i.e.*, the legal capacity under applicable statutes regulating its powers and duties, to execute a release of its rights under the deed restriction. * * * Kirshbaum's complaint, however, contains no allegations that would permit a conclusion that the Housing Authority lacks such power. On the other hand, subdivision (e) of section 34315 of the Health and Safety Code provides that a housing authority may sell, lease, exchange, transfer, assign, pledge, or dispose of any real property 'or interest in it.' This legislation is ample to permit the Housing Authority to release to the city any interest retained under the deed."

10. "It is contended that the city is illegally agreeing to vacate streets under the provision that the existing public streets in the Chavez Ravine property will no longer be needed for present or future street purposes will be vacated and the city will, upon demand of the ball club, commence proceedings to vacate the streets. * * * The agreement does not purport to control or govern the exercise of the power to determine what streets may no longer be necessary but to provide that, when the determination is made, the city will commence the required statutory procedure. * * * By this part of the contract the city is merely agreeing to do an act which it should do regardless of contract once it determines that there is no longer a need for a particular street."

11. "The contract, however, does not purport to authorize either the city or the ball club to use any of the $2,000,000 to remove a street where such removal has not been duly authorized in appropriate vacation proceedings. If it should be determined in such a proceeding that a particular street remained necessary for public use as a street, the stadium obviously could not be built at that location, but this possibility does not go to the validity of the contract. At most it might render performance impossible, a matter which is not now before us."

ARGUMENT.

I.

The Appeal Does Not Present a Substantial Federal Question.

While appellant's claim that the federal questions are substantial rests only on two grounds, namely, that "in granting prohibition the Supreme Court of California denied appellant due process of law" [Jurisditional Statement, p. 19] and that "the ordinance contravenes the contract clause of the Constitution of the United States" [p. 28], appellee respectfully submits that neither of these two grounds, nor any of the other "Questions Presented" [pp. 4 to 6] are substantial for the following reasons:

1. **The Determination by the California Supreme Court That a Writ of Prohibition Should Issue From That Court to Stay Any Further Proceedings in the Los Angeles Superior Court to Enjoin Declaring the Results of a Referendary Election on a City Ordinance Does Not Present Any Reviewable Question Before the United States Supreme Court.**

Appellant's first and second questions presented on page 4 of his jurisdictional statement, namely, "Did the Supreme Court interfere unconstitutionally with the jurisdiction granted to the Superior Court" and "did the Supreme Court act unconstitutionally in divesting the Superior Court of its power to determine issues of fact or law," thus denying to appellant due process of law "under the Fourteenth Amendent of the United States Constitution," are all matters of local procedure exclusively, under the rule announced in *Gasquet v. Lapeyre*, 242 U. S. 367, 369, that,

> "there is nothing in the clauses of the 14th Amendment guaranteeing due process and equal protection

> which converts an issue respecting the jurisdiction of a state court under the Constitution and statutes of the state into anything other than a question of state law, the decisions of which by the state court of last resort are binding upon this court."

And, also, as stated in *John v. Paullin*, 231 U. S. 583, 585,

> "Without any doubt it rests with each state to prescribe the jurisdiction of its appellate courts, the mode and time of invoking that jurisdiction, and the rules of practice to be applied in its exercise; and the state law and practice in this regard are no less applicable when Federal rights are in controversy than when the case turns entirely upon questions of local or general law."

(a) THE CALIFORNIA SUPREME COURT'S DETERMINATION OF THE ABSENCE OF ANY DISPUTED MATERIAL QUESTION OF FACT WAS MADE AFTER CAREFUL INVESTIGATION AND ITS DETERMINATION IS CONCLUSIVE.

Appellant's claim of the existence of questions of fact made at pages 14 to 19 of his jurisdictional statement was answered in detail in the briefs filed with the California Supreme Court, that court having in fact called for special briefs on this question and made the record on appeal in the *Ruben* and *Kirshbaum* cases tried in the Superior Court a part of the record in the prohibition case in order that the Supreme Court could satisfy itself on this question. (Oral argument before the Supreme Court Nov. 6, 1958 at pp. 38-41.) It did so, as announced in its decision, stating, "none of the persons attacking the contract has pointed to any evidence which would pre-

sent a substantial question of fact upon a material issue." (51 A. C. 432, 333 P. 2d 748-9.) In the language of *Newport Light Co. v. City of Newport*, 151 U. S. 527, 542, "this court is not called upon to review the correctness or incorrectness of this reasoning." Equally applicable is the thought expressed in *United States v. Pink*, 315 U. S. 203, 216:

> "In view of that ruling we are not free to inquire, as petitioner suggests, into the propriety under New York practice of grounding the motion for summary judgment on the record in the Moscow F. Ins. Co. case. That is distinctly a question of state law on which New York has the last word."

The same principle was involved in *Perryman v. Woodward*, 238 U. S. 148, wherein it was stated at page 152:

> "The master to whom the case was referred to take the proof and report his findings of fact and conclusions of law was of opinion that the widow's interest 'was purely that of dower,' and excluded the decree of the probate court. But he attached it to his report and the decree was considered by the courts, as we have indicated. The plaintiffs contend that thereby they have been prevented from introducing evidence to control the effect of the alleged decree. This is a matter of local practice that does not concern us. It was disposed of by the courts of the state."

2. The Determination That Public Funds May Lawfully Be Expended by the City of Los Angeles Involves Only the Construction of a City Ordinance and the Power and Authority of the City of Los Angeles Under the Constitution and Laws of the State of California.

Appellant's Question 3 as to whether the City Council and the Mayor violated "due process of law under the Fourteenth Amendment of the United States Constitution in approving an ordinance for the expenditure of tax funds for the purpose of acquiring and conveying land to a private corporation engaged in a private enterprise for its private profit," besides placing a construction upon the ordinance contrary to that of the California Supreme Court, raises questions solely of construction of the ordinance, determination of the public purpose involved and the power and authority of the City to act under the Constitution and laws of the state. These are not matters to be reviewed in the United States Supreme Court.

In *Green v. Frazier*, 253 U. S. 233, 239, 240, the rule is announced that when the people, the legislature and the highest court of the state have declared the purpose public, "With this united action of people, legislature, and court, we are not at liberty to interfere unless it is clear, beyond reasonable controversy, that rights secured by the Federal Constitution have been violated," which is in harmony with *Jones v. City of Portland*, 245 U. S. 217, and earlier cases therein cited.

Moreover, as pointed out in *Seattle R. & S. Co. v. Washington, ex rel. Linhoff*, 231 U. S. 568, 569, 570, where it was contended that the construction given a municipal ordinance took plaintiff's property without due process of law, "this court does not sit to revise the

construction of documents by state courts * * * and it takes more than a possible misconstruction by a court to make a case under the 14th amendment."

Finally, under *Fischer v. City of St. Louis*, 194 U. S. 361, 369, the authority of The City of Los Angeles under its charter and the constitution and other laws of the state "to adopt the ordinance in question, was settled by the decision of the supreme court, and is not open to attack here." See, also *Gundling v. City of Chicago*, 177 U. S. 183, 185, and *Henderson Bridge Co. v. City of Henderson*, 173 U. S. 592, 614.

3. Whether the City of Los Angeles May Sell to a Private Corporation Land Acquired From the Housing Authority of the City of Los Angeles (a State Agency) by Deed Containing Language Relative to Use for Public Purposes Only and Use Its Best Efforts to Have This Deed Restriction Removed Involve Matters Relating to Construction of the Deed and Power and Authority of the City Under State Law Which Are Not the Subject of Review by the United States Supreme Court nor Is Any Contract Right of Any Member of the Public Involved.

Appellant's Question 4 relative to violation of due process of law under the Fourteenth Amendment of the United States Constitution by the City Council and Mayor "approving an ordinance which proposes to sell land acquired subject to a public purpose Deed Restriction, and convey such land to a private corporation without limitation as to its intended use," is obviously appellant's misinterpretation of the ordinance. The ordinance provides that the "City agrees to use its best efforts to have

such deed restriction eliminated or modified so as to permit the use contemplated by Ball Club; provided that in the event City is unable to have such restriction so eliminated or modified this contract shall be of no further force or effect."

Both Question 4 and appellant's Question 6, did the City Council and the Mayor "violate Article I, Section 10 of the United States Constitution in adopting an ordinance which approves the extinguishment of a public purpose Deed Restriction thus constituting an impairment of contract as against the beneficiaries of the contract, to wit, the citizens of the municipality," involve:

(a) Merely an interpretation of the deed provision and the power of the City to act in the premises which, under *Seattle R. & S. Co. v. Washington, ex rel. Linhoff,* (*Supra*) 231 U. S. 568; and *Fischer v. City of St. Louis,* (*Supra*) 194 U. S. 361, are questions not reviewable in the United States Supreme Court.

(b) Any contract right protected by Section 10 of Article I that may be involved is between the grantor Housing Authority of the City of Los Angeles (a state agency, *Housing Authority v. City of Los Angeles,* 38 Cal. 2d 853, 861) and the grantee City of Los Angeles, as distinguished from individuals forming the public under the rule announced in *Walsh v. Columbus, Hocking Valley & Athens R. Co.,* 176 U. S. 469, 480, it being there said:

> "The only contract in this case was between the state of Ohio and the United States. Plaintiff was

> neither party nor privy to such contract. It was within the power of the government to prosecute the state for a breach of it, or to condone such breach, if it saw fit. As it adopted the latter course, and has deemed it proper to acquiesce in the abandonment of the canals and in the state turning them over to the railroad company, it does not lie in the mouth of the plaintiff to complain. This disposes of every question called to our attention in the briefs of counsel."

So in the case at bar, the deed was between the Housing Authority, a state agency, and The City of Los Angeles, a municipal corporation. The contract was between these two parties only. Appellant "was neither party nor privy to such contract." Therefore he has no contract right to be protected.

Even assuming merely for the sake of argument that there is involved a dedication for public use, there is no violation of contract or other impediment, even as against the grantor, in subsequently abandoning such public use and selling the land as held in *Van Ness v. Mayor, etc. of City of Washington*, 29 U. S. 232, it being stated at page 277, that

> "the opinion of this court certainly is, that under the Act of 1822 the plaintiffs can proceed by a bill in equity in the nature of a petition of right against these the United States only for the money arising from the sales, and cannot claim a decree for the land itself, or for any injunction against sales of it."

4. Determination of the Legality of the Proposed Expenditure of $2,000,000 in Site Preparation of the Land to Be Conveyed by the City Depends Exclusively Upon Interpretation of the Ordinance and the Power of the City to Contract Under State Law.

Appellant's Question 5 attempts to raise a question of due process of law under the Fourteenth Amendment with regard to the provision requiring the City prior to the passage of title to expend $2,000,000 in placing the property in a proper condition for the City to convey to the Ball Club, "the manner in which the money will be expended for such purpose to be designated by the Club."

The California Supreme Court construed this provision and upheld its legality upon the theory that, "It seems obvious that the City could not be required by the Ball Club under this provision to make any expenditures not in accord with the general purposes of the contract: The City could have paid the money to the Club outright as part of the contract consideration, without retaining any control over the manner or purpose for which the money should be expended, and the arrangement by which the City will keep possession of the money until it is expended and, in addition, some control of how it is expended, is an advantage to the City which does not militate against the validity of the contract." It is thus seen that the question resolves itself simply into an interpretation of the ordinance and the power of the City under state law to act in the premise. These are matters which the Supreme Court of the United States will not review under the rule announced in *Seattle R. & S. Co. v. Washington, ex rel. Linhoff,* (*Supra*) 231 U. S. 568 and *Fischer v. City of St. Louis,* (*Supra*) 194 U. S. 361.

Also, as stated in *Kovacs v. Cooper*, 336 U. S. 77, 84, 85, "Although this Court must decide for itself whether federal questions are presented and decided, we must accept the state court's conclusion as to the scope of the ordinance."

5. The Tax Structure of a State Designating the Property to Be Taxed and Exemptions From Taxation Is Purely a State Affair of Which the United States Supreme Court Will Refrain From Passing Upon.

Appellant's Question 7, did the City Council and Mayor violate the equal protection under the Fourteenth Amendment in adopting an ordinance "which approves a method of sale of Municipal owned land, which will enable the purchaser to claim as an exemption the payment of City and County taxes as to 40 acres of the land being sold * * * in that it will permit a private corporation to be exempt from its just share of City and County taxation to the detriment of the remaining taxpayers of the Municipality," arises from the provision that the Ball Club will construct recreational facilities costing not to exceed $500,000 on a 40-acre portion of the property to be conveyed by the City and pay to the City $60,000 per year for maintenance thereof for a period of 20 years during which title is to be retained by the City to assure performance by the Ball Club of its policy of providing and maintaining recreational facilities, and in the event such policy and all of the terms of the agreement have been fully and faithfully performed title to such 40 acres shall be conveyed to the Ball Club or Nominee without further consideration. This question of tax exemption is purely a matter of state affair under the rule announced in *Missouri, ex rel. Hill v. Dockery*, 191 U. S. 165, 171.

II.

The Federal Questions Sought to Be Reviewed Were Not Timely or Properly Raised, or Expressly Passed on by the California Supreme Court.

The City's Petition for Writ of Prohibition was filed in the court below on August 7, 1958. In accordance with California procedure (Rule 56(b) of Rules on Original Proceedings in Reviewing Courts, 50 Cal. 2d 43), appellant opposed the petition by filing points and authorities in opposition on August 25, 1958. No mention of the Constitution or laws of the United States was made in that document. Thereafter, the Supreme Court of California issued an alternative writ of prohibition. (See Cal. Code Civ. Proc., Sec. 1104.) Under state practice, appellant then had an opportunity to plead to the City's petition by making a return to the alternative writ in the form of a demurrer, a verified answer, or both. (Cal. Code Civ. Proc., Secs. 1105, 1089; Rule 56(c) of Rules on Original Proceedings in Reviewing Courts, 50 Cal. 2d 43.) Appellant, however, made no return. Thus, when this case was heard by the court below on November 6, 1959, no federal issue was posed by the pleadings.

It is true that, during the course of his oral argument in the California Supreme Court, appellant alluded to an alleged denial of "due process of law." [See p. 44 of appendix to jurisdictional statement.] But that allusion did not present a federal question for decision below, even disregarding the fact that no due process issue was pleaded. The California Constitution also has a due process clause (Art. I, Sec. 13), and appellant's argument is therefore deemed to have referred to that provision instead of to the due process clause of the Fourteenth Amendment to the Federal Constitution. (*Bond v. Scott*, 233 U. S. 658, 665.)

It is also true that appellant did file a further paper in this case prior to the decision of the court below, and that in an appendix to that document he referred to Article I, section 10 of the United States Constitution. (Brief of Respondent Louis Kirshbaum in Opposition to Application for Prohibition, pp. F-25 through F-27; see also p. B-17.) That document resulted from the fact that, at the hearing in the California Supreme Court, appellant's counsel argued that numerous questions of fact were involved in determining the validity of the proposed contract authorized by the ordinance. In view of that assertion, the court granted appellant leave to file a brief. [Tr. of Oral Argument, p. 41.] Appellant thereupon filed the aforementioned brief in which he not only attempted to demonstrate the existence of questions of fact, but also voluminously further argued, both in the body of the brief and through numerous appendices, that the contract and ordinance would be invalid.

The argument in an appendix to that document that the contract is invalid under Article I, section 10 of the Federal Constitution can hardly qualify as a timely and properly raised federal question. The situation is similar to that involved in *Zadig v. Baldwin*, 166 U. S. 485, 488, where, in dismissing a writ of error to the Supreme Court of California, it was stated:

> "The contention that there was a Federal question raised below finds its only support in the fact that there has been printed in the record, as filed in this court, what purports to be an extract from the closing brief of counsel presented to the supreme court of the state, in which such a Federal question is discussed, and it is asserted orally at bar that in the oral argument made in the supreme court

of California a claim under the Federal Constitution was presented. But, manifestly, the matters referred to form no part of the record and are not adequate to create a Federal question when no such question was necessarily decided below, and the record does not disclose that such issues were set up or claimed in any proper manner in the courts of the state."

III.

The Judgment Rests on an Adequate Nonfederal Basis.

In view of the circumstance that the Supreme Court of California did not expressly pass upon any Federal issue, and in view of the condition of the pleadings in this case, it is submitted that the judgment below rests completely upon state grounds. As stated in *Lynch v. New York ex rel. Pierson*, 293 U. S. 52, 54:

". . . jurisdiction cannot be founded upon surmise. Nor can claim of jurisdiction be sustained by reference to briefs and statements which are not part of the record.

"It is essential to the jurisdiction of this Court in reviewing a decision of a court of a State that it must appear affirmatively from the record, not only that a federal question was presented for decision to the highest court of the State having jurisdiction but that its decision of the federal question was necessary to the determination of the cause, and that it was actually decided or that the judgment as rendered could not have been given without deciding it. . . ."

And see:

Cook County v. Calumet & Chicago Canal Co., 138 U. S. 635, 651.

Conclusion.

For the reasons stated it is respectfully submitted that the appeal of Louis Kirshbaum in this cause should be dismissed.

Viewed dispassionately the contract authorized by Ordinance No. 110,204 is highly beneficial to the public and disposition of the protracted litigation over this ordinance at the earliest possible date is equally in the public interest. As appears from the affidavit of the City Administrative Officer of The City of Los Angeles attached to the petition for writ of prohibition filed in the California Supreme Court as Exhibit E, the contemplated improvement will create an annual tax revenue of $369,920 to be distributed to the various taxing agencies involved, as compared to a present tax revenue of $733.18. It is thus seen from a standpoint of tax revenue alone the public is losing over $1,000 for each day of delay of completion. It is respectfully urged that consideration of this motion to dismiss be considered as early as is compatible with the case load of this Honorable Court.

Respectfully submitted.

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